IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-470

GRADY D. KERSH, MAX V. ROGERS, and JIMMY A. PRICE,

Petitioners,

v.

V. LEE BOUNDS, Commissioner of the North Carolina Department of Correction; C. GRIER BEAM, Chairman of the Board of County Commissioners of Gaston County; W. J. PHARR, DR. CHARLES A. GLENN, E. A. FRONEBERGER, POLIE Q. CLONIGER, JR. and CHARLES A. RHYNE, Members of the Board of County Commissioners of Gaston County; THEODORE L. BURRELL, Chairman of the Board of County Commissioners of Polk County, BILLY HUGH RUFF and PHILLIP WALKER, Members of the Board of County Commissioners of Polk County,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

The petitioners, Grady D. Kersh, Max V. Rogers, and Jimmy A. Price, pray that a writ of certiorari issue to review the judgment made by the United States Court of Appeals for the Fourth Circuit, entered July 25, 1974, reversing the judgment of the United States District Court for the Western District of North Carolina, and denying injunctive relief to petitioners.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported. The opinion of

the United States District Court for the Western District of North Carolina is reported at 364 F. Supp. 590 (W.D. N.C. 1973). Copies of these opinions are appended to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

1. Are prisoners held on "safekeeping" status under the care and custody of the North Carolina Department of Correction denied equal protection of the law in that they are not provided medical treatment equivalent to that provided all other prisoners under the care and custody of the Department of Correction?

2. Are prisoners held on "safekeeping" status by the North Carolina Department of Correction denied due process because they are not given the medical treatment prescribed for them by their physicians?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV.

Section 1. All persons born or

> naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

General Statutes of North Carolina:

N.C.G.S. 15-183

> Any person who shall appeal to the Appellate Division of the General Court of Justice, having been sentenced to a term of imprisonment for longer than 30 days, and is not released pursuant to this section pending appeal, such person may be placed in the custody of the Commissioner of Correction until such time as he may be released upon bail or by other lawful means and pending the action of the Appellate Division.

N.C.G.S. 148-29

> The Sheriff having in charge any prisoner sentenced to the Central

Prison at Raleigh shall send him to the Central Prison within five days after the adjournment of the Court at which he was sentenced, if no other appeal has been taken. The Sheriff shall file with the Board of Commissioners of his County a copy of his affidavit as to necessary guard, together with a copy of his itemized account of expenses, both certified to by the Auditor as true copies of those on file in his office. The State is not liable for the expenses of maintaining convicts until they have been received by the State Department of Correction authorities, nor shall any money be paid out of the treasury for support of convicts prior to such reception.

N.C.G.S. 162-39*

Whenever necessary for the safety of a prisoner held in any county jail or to avoid a breach of the peace in any county, the resident judge of the superior court or any judge holding superior court in the district may order the prisoner transferred to a fit and secure jail in some other county, or to a unit of the State prison system designated by the Commissioner of Correction or his authorized representative, where the prisoner

*Prior to February 1, 1974 N.C.G.S. 153-189.1

shall be held for such length of time as the judge may direct. The Sheriff of the county from which the prisoner is removed shall be responsible for conveying the prisoner to the jail or prison unit where he is to be held, and for returning him to the common jail of the county from which he was transferred. The return shall be made at the expiration of the time designated in the court order directing the transfer unless the judge, by appropriate order, shall direct otherwise. The sheriff or keeper of the jail of the county designated in the court order, or the officer in charge of the prison unit designated by the Commissioner of Correction, shall receive and release custody of the prisoner in accordance with the terms of the court order. The county from which a prisoner is transferred shall pay to the county receiving the prisoner in its jail, or to the State Department of Correction if he is received in a prison unit, the actual cost of maintaining the prisoner in that jail or prison unit for the time designated by the court.

Whenever prisoners are arrested in such numbers that county jail facilities are insufficient and inadequate for the safekeeping of such prisoners, the resident judge of the superior court or any judge holding superior court in the

district may order the prisoners transferred to a unit of the State Department of Correction designated by the Commissioner of Correction or his authorized representative, where the prisoners may be held for such length of time as the judge may direct, such detention to be in cell separate from that used for imprisonment of persons already convicted of crimes. The sheriff of the county from which the prisoners are removed shall be responsible for conveying the prisoners to the prison unit or units where they are to be held, and for returning them to the common jail of the county from which they were transferred. However, if due to the number of prisoners to be conveyed the sheriff is unable to provide adequate transportation, he may request the assistance of the Department of Correction, and the Department of Correction is hereby authorized and directed to cooperate with the sheriff and provide whatever assistance is available, both in vehicles and manpower, to accomplish the conveying of the prisoners to and from the county to the designated prison unit or units. The officer in charge of the prison unit designated by the Commissioner of Correction or his authorized representative shall receive and release the custody of the prisoners in accordance with the terms

of the court order. The county from which the prisoners are transferred shall pay to the State Department of Correction the actual cost of transporting and maintaining the prisoners. However, if the county commissioners shall certify to the Governor that the county is unable to pay the bill submitted by the State Department of Correction to the county for the services rendered, either in whole or in part, the Governor may recommend to the Council of State that the State of North Carolina assume and pay, in whole or in part, the obligation of the county to the Department of Correction, and upon approval of the Council of State the amount so approved shall be paid from Contingency and Emergency Fund to the Department of Correction.

When, due to an emergency, it is not feasible to obtain from a judge of superior court a prior order of transfer, the sheriff of the county and the Department of Correction may exercise the authority hereinafter conferred; provided, however, that the sheriff shall, as soon as possible after the emergency, obtain an order from the judge authorizing the prisoners to be held in the designated place of confinement for such period as the judge may direct. All provisions of this section shall

be applicable to municipalities whenever prisoners are arrested in such numbers that the municipal jail facilities and the county jail facilities are insufficient and inadequate for the safekeeping of the prisoners. The chief of police is hereby authorized to exercise the authority herein conferred upon the sheriff, and the cost of transporting and maintaining the prisoners shall be paid by the municipality unless action is taken by the Governor and Council of State as herein provided for counties which are unable to pay such costs.

STATEMENT OF THE CASE

This suit was brought as a class action wherein the petitioners, acting as representatives for their class, sued to enjoin the respondents from providing less medical care to prisoners held on "safekeeping" status with the North Carolina Department of Correction than is provided to other regular inmates under the control and custody of the North Carolina Department of Correction. The United States District Court for the Western District of North Carolina, Honorable James B. McMillan, District Judge, granted the petitioners the injunctive relief requested in a judgment dated March 30, 1973. The District Court judgment was reversed in an opinion of the United States Court of Appeals for the

Fourth Circuit entered on July 25, 1974, Judge Butzner dissenting. Petitioners then petitioned for a rehearing en banc, but said petition for rehearing was denied by order filed September 25, 1974.

Prisoners on "safekeeping" status are prisoners who have been transferred to the custody and control of the North Carolina Department of Correction by order of a Superior Court Judge of North Carolina and who are awaiting trial in a Superior Court or who are awaiting the outcome of an appeal from a conviction and sentence in a Superior Court.

The North Carolina Department of Correction provides certain medical services for inmates in both committed and safekeeping status. However, when dealing with prisoners on "safekeeping" status the medical staff of the Department of Correction is required to make a determination as to whether medical services for safekeepers are "emergency," "routine" or "elective." Elective medical services are defined as those services which are not essential to the safekeepers' immediate welfare and pose no threat to life and limb. The Department of Correction has a practice and procedure by which it will not provide "elective" medical services to those on "safekeeping" status until it first obtains notice that the forwarding county will accept financial responsibility for the expenses incurred in providing the "elective" medical services. There is no indication that

these "elective" medical services are not necessary or are not needed by the prisoners. There is merely the indication by the medical staff that these services can be delayed since that denial poses no immediate threat to life and limb, though they are needed and eventually necessary.

Prisoners forwarded to the custody of the Department of Correction as "safekeepers" by the counties of North Carolina are provided all food, clothing, housing and emergency and routine medical services and the forwarding county is later billed for the expenses incurred. The only instance in which the Department of Correction requires the counties to assume financial responsibility before providing services to the "safekeeping" prisoners is in that instance where the medical service has been denominated as "elective." In all other instances the services are provided and the county is later billed for those services.

It is clear that the Department of Correction provides all prescribed medical care for prisoners whose sentences have become final. It is only the safekeeper prisoners who are deprived of such medical care. The overwhelming percentage of "safekeepers" are persons awaiting determination of an appeal. Because there are a substantial number of persons held on safekeeping status (the average number being 140 at any one time) and

because safekeepers are often in the care and custody of the Department of Correction for many months (the average stay for a person on safekeeping status being 5 months), there is often a prolonged deprivation of needed health care for a substantial number of persons.

Petitioner Max V. Rogers' case is but one example of the deficient medical treatment that "safekeepers" must endure. Max V. Rogers was placed on safekeeping status while awaiting the outcome of an appeal from a judgment of the Superior Court of Gaston County. While he was on safekeeping status Max V. Rogers had lost his teeth, was blind in his left eye and had a visual weakness in his right eye. It was stipulated by all parties that Max Rogers was in need of corrective lenses for his right eye and was also in need of a set of false teeth. Petitioner Rogers requested the North Carolina Department of Correction to supply him with the required eyeglasses and the false teeth but they refused to supply him with those items.

The North Carolina Department of Correction refused to supply petitioner Rogers with the requested medical care because he was on safekeeping status and they would not supply him with such required medical care until they received notice from Gaston County that it would assume financial reponsibility for the expenses incurred. On July 22, 1971, Dr. Morton Meltzer, North Carolina Department of Correction Medical Director wrote a letter to the Sheriff of

Gaston County stating that the petitioner Rogers was in need of corrective lenses, was reporting pain in his right eye and asked Gaston County to assume financial reponsibility for providing the necessary corrective lenses to plaintiff Rogers. The Gaston County authorities failed and refused to supply him with the necessary eyeglasses and false teeth.

It was stipulated by all parties that had petitioner Rogers been confined as a prisoner within the regular prison population of the North Carolina Department of Correction, the medical treatment sought by him would have been provided to him. In fact, soon after petitioner Rogers was taken off safekeeping status and placed in the general prison population of the North Carolina Department of Correction (which was done as soon as his conviction was affirmed on appeal) petitioner Rogers was furnished with both the false teeth and corrective eyeglasses he had earlier requested.

ARGUMENT

I. Prisoners held on "safekeeping" status under the care and custody of the North Carolina Department of Correction are denied equal protection of the law in that they are not provided medical treatment equivalent to that provided all other prisoners under the care and custody of the Department of Correction.

There is no question but that prisoners held on "safekeeping" status in the

North Carolina Department of Correction are given less medical care than that given to prisoners within the regular prison population of the North Carolina Department of Correction. The defendants have stipulated that they have a well established practice of denying medical care of certain types to "safekeeping" prisoners, while providing these types of medical treatment to prisoners within the regular prison population. It is this unequal treatment of "safekeeping" prisoners which was attacked by the petitioners and which was held to be unconstitutional by the District Court. It is this discriminatory treatment which must be measured against the constitutional proscriptions of the equal protection clause.

The respondents mistakenly argued before the Court of Appeals that the District Court's opinion was directed at the classification between county jails and state prisons and the majority opinion of the Court of Appeals mistakenly used this argument as one basis for its reversal of the District Court.

> We think the District Court erred when it held the Equal Protection Clause violated upon the facts of this case. Under the North Carolina System, Department prisoners are those who have exhausted their avenues of appeal and are serving their sentences,

> and all such prisoners are furnished disputed elective medical care. Safekeeper prisoners, however, are not in the category, for they have not yet been committed to the trust and control of the Department, despite the fact that some safekeepers may be assigned to the Department for custodial purposes only at the expense of the county. But the difference is at once apparent. Prisoners whose terms are not fixed by reason of pending appeals or because not yet tried are safekeepers, prisoners of the county. North Carolina has simply said that those charged with or convicted of crime are county prisoners until they begin serving their sentences, at which time they become Department prisoners. Since the county prisoners are treated alike and the Department prisoners treated alike, we are of the opinion that there is no equal protection violation.
> (Slip opinion, pp. 7-8)

However, to say that prisoners on "safekeeping" status within the Department of Correction are county prisoners is to apply form over substance. As the

District Court so ably recognized:

> The Fourteenth Amendment applies to the states, and a state may not escape its constitutional obligations simply by the manner in which it has created subdivisions or departments in order to provide public services . . . . There is no rational basis in giving prisoners different medical treatment just because the state has divided the responsibility of footing the bill among different governmental subdivisions. Kersh v. Bounds, 364 F. Supp. 590, 593 (W.D.N.C. 1973).

Clearly the legislative scheme established in the North Carolina Statutes does not require or even suggest that different medical treatment should be given to "safekeeping" prisoners. That legislative scheme merely establishes which department or subdivision of the state shall pay the actual costs of maintaining the "safekeeping" prisoner. N.C. G.S. 162-39. Nowhere in the legislative acts governing "safekeepers" is there the requirement or suggestion that "safekeeping" prisoners receive less medical care than do the other prisoners under the care and custody of the Department of Correction. This requirement is found only in the practice and procedure of the Department of Correction.

There is no reason why the Department cannot provide all types of medical care to

safekeepers when the medical care is needed and later bill the counties for their services. This would clearly be in compliance with the language and intent of the North Carolina Statutes. Furthermore, this is the practice of the Department of Correction as regards food, clothing, housing and emergency and routine medical care. It is only certain types of medical care, which the Department denominates as "elective" that the Department refuses to furnish until it gets an assurance from the forwarding county that the county will assume financial responsibility. If it is kept in mind that this classification was the one declared unconstitutional by the District Court (and not the spurious classification set forth in the respondents' argument), it is clear that the classification furthers no legitimate state interest and violates the petitioners' rights to equal protection under the law.

The majority opinion of the Court of Appeals also found that the respondents had justified their discriminatory practices because "it would be a nuisance and administrative inconvenience for the state to be forced to give unessential medical care to safekeeper prisoners. . ." (Slip opinion, p. 9) The petitioners respectfully contend that this finding is in conflict with established law and that the correct statement of the law is as set forth in the District Court's opinion in this case. Administrative efficiency is not a state interest which can justify the discrimination here present. Mere administrative efficiency has

been found insufficient to justify an otherwise invidious discrimination. See, eg. Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.ed 2d 225 (1971) Even if administrative efficiency were a justification, there is no showing that the present classification enhances administrative efficiency. In fact, it appears that the practice of the Department adds to the administrative burden, if anything, because of the necessity of additional correspondence with the forwarding counties to check whether those counties will assume financial responsibility or not. As demonstrated so amply in the District Court opinion, the administrative efficiency produced by this discriminatory treatment is at most marginal.

Likewise, a state interest or objective of saving the state money is not sufficient to allow the classification to withstand attack under the equal protection clause. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.ed. 891 (1956); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.ed. 2d 600 (1969). But even if the saving of state money was a legitimate objective, there is no proof that the discriminatory medical practice here involved does result in a saving of money to the State. The North Carolina Statutes require the forwarding county to bear the costs of maintaining the "safe-keeping" prisoner. It appears that the county would have to bear this costs whether it gave its assurance that it would assume financial responsibility or not. Thus, the State would never have to

bear the costs of providing medical care to safekeepers and thus the discriminatory practice here challenged cannot possibly result in a saving of state money.

The petitioners respectfully contend that the conclusion reached by the majority in the Court of Appeals, is incorrect. The majority found that North Carolina has a rational basis for its discriminatory practice stating: "We see nothing irrational about the State paying for prisoners in its care, and counties paying for prisoners in their care, although such latter prisoners may have been housed by the State on a temporary basis." (Slip opinion p. 10). The majority's opinion must be seen to be incorrect when it is remembered that the District Court did not strike down the legislative scheme requiring that the State pay for prisoners in its care and that the counties pay for prisoners technically in their care. All the District Court did was to enjoin the practice of the Department in denying certain types of medical care to "safekeepers." The cost of the care of prisoners on "safekeeping" status is still to be borne by the counties, and thus the desire of the State legislature and the requirements of the statute are complied with and promoted.

Under the legislative scheme the forwarding county is to bear the costs of maintaining the prisoner regardless

of the costs or the type of care needed by the prisoner. The discriminatory practice of the Department does nothing to advance this legislative purpose but does meaningfully inhibit a "safekeeping" prisoner's need for medical care. Since there is no real or substantial connection between the classification and discrimination practiced by the Department of Correction as regards medical care for "safekeepers" and the legislative objective establishing which of its subdivisions shall pay for the upkeep of these "safekeeping" prisoners, the discriminatory practice is irrational and therefore in violation of the petitioners' right to equal protection. Furthermore, as pointed out by Judge Butzner in his dissent, the discrimination practiced by the Department cannot be justified when its effect is to burden unnecessarily the prisoner's right to appeal.

> This case illustrates yet another form of deprivation of due process of law and invidious discrimination against prisoners who pursue their right of appeal. A state prisoner who elects not to appeal is provided non-emergency medical services deemed appropriate by prison doctors. On the other hand, the state denies similar medical attention to a prisoner while his appeal is

pending.
(Slip opinion, p. 13)
(Citations omitted)

The State has a positive obligation to provide medical care for those in its custody. It may not classify these inmates in such a way as to deny them proper medical care unless the classification can be said to have a rational basis. The petitioners respectfully contend that there is no rational basis for the discriminatory classification and discriminatory medical treatment practiced by the respondents.

It must be remembered that the Fourteenth Amendment follows a prisoner into prison and protects him there from unconstitutional actions by the prison authorities under color of state law. Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala.), aff'd per curiam, sub nom Lee v. Washington, 390 U.S. 333, 88 S.Ct. 994, 19 L.ed. 2d 1212 (1968). The petitioners in this case, and the members of their class respectfully request that this Court enforce the constitutional protections to which they are entitled.

II. Prisoners are entitled to the treatment prescribed for them by their physicians, absent some compelling state interest implemented through a narrow restriction.

In this action it was stipulated that the failure to provide certain medical treatment to the petitioners and

the members of their class is a consequence of a deliberate decision by the Department of Correction based on a well established practice and policy. Here it was stipulated that the treatment refused the petitioners would be beneficial to them, is needed by them, and would be provided them if they were members of the regular prison population rather than "safekeepers". Just as a prisoner is not the ultimate judge of what medical treatment is necessary or proper for his care, Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970), so also the prison administration cannot be the final judge. Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970); Sawyer v. Sigler, 320 F. Supp. 690 (D. Neb. 1970).

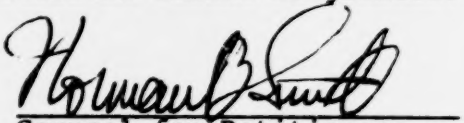
Here the prison physicians had diagnosed and recommended certain treatments for the petitioners. For example, it was stipulated in this case that the prison physicians had determined that the petitioner Max V. Rogers was in need of eyeglasses and false teeth and that if he had been confined as a regular inmate rather than as a "safekeeper" he would have been provided with the necessary eyeglasses and false teeth. In fact, as soon as Mr. Rogers was taken off "safekeeping" status and joined the regular prison population, he was given the needed medical treatment. The decision not to provide these medical services was thus purely an administrative decision by the Department based on a well established policy

and procedure and was not based on the medical needs of petitioner Rogers or the treatment prescribed by the Department's physicians.

The North Carolina Department of Correction in failing and refusing to provide the treatment prescribed by its own physicians violates the absolute right of its inmates to receive medical treatment prescribed for them by their physicians. "Absent some compelling state interest implemented through a narrow restriction, the inmate has an absolute right to the treatment. . . . prescribed for him by the physicians." The Emerging Rights of the Confined, pp. 151-152 (South Carolina Department of Correction 1972).

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.



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*The prosecution of this action is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1578
No. 73-1579

GRADY D. KERSH, MAX V. ROGERS and JIMMY A. PRICE,

Appellants,

v.

V. LEE BOUNDS, Commissioner of the North Carolina Department of Corrections, et al.,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, Charlotte Division. James B. McMillan, District Judge.

Argued February 7, 1974

Decided July 25, 1974

Before BRYAN, Senior Circuit Judge, BUTZNER and WIDENER, Circuit Judges.

WIDENER, Circuit Judge:

This suit was brought under 42 USC §1983 by three indigent inmates of the North Carolina Department of Correction (Department) against the Correction Department Commissioner and the members of the Board of Commissioners of Gaston and Polk Counties, North Carolina. The prisoners alleged that the defendants had treated prisoners in safekeeping status, called safekeepers, normally housed in county prisons at county expense, differently from the regular inmates under custody and control of the Department insofar as their requests for elective, non-essential medical services are concerned. They say the safekeepers had thus suffered cruel and unusual punishment in violation of the Eighth Amendment and that this discrimination ran afoul of the Fourteenth Amendment Equal Protection Clause. The case was tried, without a jury, on stipulations of fact, the district court concluding that the prisoners did not prove cruel and unusual punishment, but that the state had no rational basis for such classification among prisoners, and violated the Equal Protection Clause by so doing. The defendants were ordered not to treat the safekeepers differently in any medical matter from other prisoners generally, and each plaintiff was awarded $1.00 as nominal damages. Because we conclude that the state has a rational basis for its action, and there was no Equal Protection violation, we reverse.

One category of safekeeper is a prisoner who has been sentenced to a term of imprisonment for longer than thirty days, has appealed his conviction, and has not been released on bail pending appeal. A safekeeper may also be one held pending trial. Such prisoners are generally held in county jails and the cost of maintaining the prisoner is paid by the county where the prisoner was tried. Safekeepers held pending appeal may be transferred, as a matter of course, to the Department in accordance with N.C.G.S. 15-183, while any other county prisoner may be transferred if considered necessary for his safety or to avoid a breach of the peace. N.C. G.S. 153-189.1.[1] In any event, the Department is not liable for the expenses of maintaining convicts until they have been received by Department authorities and, since execution of the sentence is automatically stayed pending appeal under N.C.G.S. 15-184, safekeepers are not regarded as serving sentences in the Department systaem until their appeals are decided. The county responsible is billed by the Department for the safekeepers held by the Department for the county. See also N.C.G.S. 148-4 and 148-29. The parties stipulated that an average of 140 North Carolina prisoners are on safekeeping status in the custody of the Department at any given time, and that the average stay of a person on safekeeping status is five months. The average stay of felony prisoners in

1. Effective February 1, 1974, N.C.G.S. 162-39.

the Department system is slightly more than four and one half years, and misdemeanants slightly more than ten months.

The Department medical staff categorizes inmate medical services as being emergency, routine, or elective. Emergency and routine medical care is given to all state and county prisoners, including safekeepers, while elective care (i.e., that which is not essential to the safekeeper's immediate welfare and poses no threat to life or limb) is given at Department expense only to prisoners in custody of the Department who are not on safekeeping status.

The three plaintiffs were all on safekeeping status, held at a Department prison, at the time this suit was filed, and all subsequently became regular inmates under the general custody and control of the Department.

While on safekeeping status pending trial, being held by the Department by order of the Superior Court of Gaston County, plaintiff Price (on loan from the State of Florida for trial) was examined by prison doctors on June 22, 1971 and found to have a slight umbilical hernia. The Department medical staff did not, in their judgment, believe any treatment was necessary, and, at a subsequent examination on December 23, 1971, no hernia was found.

Plaintiff Kersh, while on safekeeping pending appeal, was examined on May 5, 1971 and found to have 20-25 vision. He was found not to be in immediate need of glasses and was not given any. Kersh was again examined on November 4, 1971 and was found to have perfect (20/20) vision at that time.

Plaintiff Rogers was a safekeeper pending appeal who, on examination, was found to need corrective eyeglasses and false teeth (there is no allegation he did not come to prison without either). His request for same was refused, but he received both eyeglasses and false teeth in the fall of 1971 when his conviction was affirmed and he became a regular inmate.

It was stipulated that, had these prisoners been members of the regular prison population other than in safekeeping status when these minor physical impairments were found to exist, they would have been provided with the medical attention or corrective appliances, the lack of which is complained of.

It is argued that the effect of the order of the district court has been to declare the applicable North Carolina statutes unconstitutional, and that a three-judge court should have been convened to hear the case. This contention has no merit, for the only issue here concerned the pattern or practice of state officials in treating safekeeper prisoners different from other prisoners.

It is well-settled that when the allegation of unconstitutionality goes to the result obtained by use of statutes not attacked as unconstitutional, a three-judge court is not required. E.G., Turner v. Fouche, 396 U.S. 346, 353-54 and n. 10 (1970).

The district court viewed the issue here as being whether there is any justification for inmates being treated to different standards of medical care because those services are being paid for by different divisions of the government, safekeepers by the county, the others by the state. It found that plaintiffs had not proved cruel and unusual punishment, so only the constitutionality of the practice which maintained the two standards of medical treatment for prisoners is considered here. The Court was not impressed with the State's argument that safekeeping status only lasted a short time, and to require providing of elective medical care would cost the state more money. The court said that this distinction between prisoners, based on which state instrumentality pays the bill, is arbitrary and unreasonable, and held such procedure to be a violation of the Equal Protection Clause.

We think the district court erred when it held the Equal Protection Clause violated upon the facts of this case. Under the North Carolina system, Department prisoners are those who have exhausted their avenues of appeal and are

serving their sentences, and all such prisoners are furnished the disputed elective medical care. Safekeeper prisoners, however, are not in that category, for they have not yet been committed to the custody and control of the Department, despite the fact that some safekeepers may be assigned to the Department for custodial purposes only at the expense of the county. The difference is at once apparent. Prisoners whose terms are not fixed by reason of pending appeals or because not yet tried are safekeepers, prisoners of the county. North Carolina has simply said that those charged with or convicted of crime are county prisoners until they begin serving their sentences, at which time they become Department prisoners. Since the county prisoners are treated alike and the Department prisoners treated alike, we are of opinion there is no equal protection violation. The fact that some county prisoners are housed in Department prisons is not of constitutional significance nor is the fact that the county continues to bear the expense of those prisoners.

Even assuming, however, that the district court was correct in its holding that the North Carolina Department of Correction may have only one category of prisoners, which must include all in the physical custody of the Department, there would still be no Equal Protection violation. "There is no doubt that discipline and administration of state detention facilities are state functions.

They are subject to federal authority only where paramount federal constitutional or statutory rights supervene." Johnson v. Avery, 393 U.S. 483, 486 (1969). The constitutional deprivations alleged here were that these three safekeeper prisoners were not allowed elective and unessential, but desired, medical treatment at state expense while prisoners who are regarded as serving their sentences do receive such care as a matter of course. This administrative procedure, just as bail release procedures considered in Schilb v. Kuebel, 404 U.S. 357 (1972), could hardly be regarded as affringing some fundamental right, emanating from the Constitution, or as being based on any suspect criterion. That being so, the applicable standard for measuring the justification of this different treatment of prisoners is the traditional one of whether the distinction has some rational basis. McGinnis v. Royster, 410 U.S. 263, 270 (1973); Schilb v. Kuebel, supra, 404 U.S. at 365 (1972).

We agree with the defendants that it would be a nuisance and administrative inconvenience for the state to be forced to give unessential medical care to safekeeper prisoners, but our conclusion need not be based on this nor on the fact that prisoners who now say they desire this unessential treatment did not have it outside the prison and were, nevertheless, able to commit their crimes unhindered by their medical inconveniences, which, on the average, would have to wait only five months for treatment.

We think that North Carolina has a rational basis for providing by law that counties shall pay for the upkeep of prisoners whose terms of confinement are uncertain and have not become fixed, who are subject to immediate return to the Sheriff of the County and who are ordinarily in the physical custody of the Sheriff of a county. We see nothing irrational about the State paying for prisoners in its care, and counties paying for prisoners in their care, although such latter prisoners may have been housed by the State on a temporary basis.

We note that the plaintiffs admittedly have been furnished with both routine and emergency medical care. Failure to furnish other and additional elective medical care, which is not essential to the immediate welfare of the prisoners and the lack of which poses no threat to life or limb, we do not think is irrational. It may not be seriously contended that any prisoner detained for however short a period is entitled to have all his needed elective medical care performed while in custody, and it may not be argued that the State is not entitled to set some standard as to which prisoners shall receive the care. When we remember that safekeepers are in the custody of the Department only five months, half that of misdemeanants and less than one-tenth that of felons, and that safekeepers are essentially county prisoners, only being housed by the State on a temporary basis

we do not think North Carolina has acted in an irrational, arbitrary or capricious manner toward them. To the contrary, we are of opinion their treatment so far as medical care is concerned is both reasonable and rational and free from constitutional infirmity.

In sum, we can find nothing arbitrary, capricious or irrational in this state procedure. As the Supreme Court stated in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961), "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." This is not such a case. Although set in a different context, we think the language of the court in Ross v. Moffitt, No. 73-786, 42 L.W. 4940, 4943 _____ U.S. _____ (June 17, 1974), is persuasive: "Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this court. The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages'. [Citation omitted] Nor does it require the State to 'equalize economic conditions'." And, referring to the equal protection question there presented (State appointed attorneys for indigents in discretionary appeals), the court continued: "The question is not one of absolutes but one of degrees." 42 L.W. 4940, 44.

In view of the disposition we make of the case, we need not consider its class action aspects.

The judgment of the district court is

REVERSED.

BUTZNER, Circuit Judge, dissenting:

This case illustrates yet another form of deprivation of due process of law and invidious discrimination against prisoners who pursue their right to appeal.* A state prisoner who elects not to appeal is provided non-emergency medical services deemed appropriate by prison doctors. On the other

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*See Blackledge v. Perry, 42 U.S.L.W. 4761 (May 20, 1974) (felony indictment after request for de novo review of misdemeanor conviction); North Carolina v. Pearce, 395 U.S. 711 (1969) (unjustified increased sentence on retrial after habeas corpus); Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971) (refusal to credit time served pending appeal towards commutation of life sentence); Cole v. North Carolina, 419 F.2d 127 (4th Cir. 1969) (refusal to credit incarceration pending appeal to sentence).

hand, the state denies similar medical attention to a prisoner while his appeal is pending. If the prisoner has been erroneously convicted, he is released or remanded for a new trial without the medical care which the state refused to provide during his wrongful incarceration. If he was properly convicted, he receives the care to which he would have been entitled in the first place had he not appealed.

I would hold that a prisoner is deprived of due process of law when the state pursues otherwise legitimate policies in a manner that is calculated to burden unnecessarily his right to appeal. Furthermore, there is no rational nexus between the exercise of this right and the state's classification of prisoners for medical purposes. Encumbrances on a right so important as appeal must be justified by more than the trifling cost and administrative inconvenience shown in this record. I would affirm also for the reasons stated in the excellent opinion of the district judge. Kersh v. Bounds, Civil No. 2966-Charlotte (W.D.N.C., Mar. 30, 1973).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 73-1578 and
73-1579

GRADY D. KERSH, MAX V. ROGERS and JIMMY A. PRICE,

Appellees

v.

V. LEE BOUNDS, Commissioner of the North Carolina Department of Correction, et al.,

Appellants

ORDER

We have considered the petition for rehearing and the suggestion for rehearing en banc. No judge has requested a poll of the court on the suggestion for rehearing en banc.

Judge Bryan and Judge Widener are of the opinion the petition for rehearing is without merit. Judge Butzner

would rehear the case and affirm the judgment of the district court.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

/s/ H. E. Widener, Jr.
For the Court

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil No. 2966

GRADY D. KERSH, MAX V. ROGERS, and JIMMY A. PRICE,

Plaintiffs,

vs.

V. LEE BOUNDS, Commissioner of the North Carolina Department of Correction; C. GRIER BEAM, Chairman of Board of County Commissioners of Gaston County; W. J. PHARR, DR. CHARLES A. GLENN, E. A. FRONEGERGER, POLIE Q. CLONINGER, JR., and CHARLES A. RHYNE, Members of the Board of County Commissioners of Gaston County; THEODORE L. BURRELL, Chairman of Board of County Commissioners of Polk County; BILLY HUGH RUFF and PHILLIP WALKER, Members of the Board of County Commissioners of Polk County,

Defendants.

OPINION AND JUDGMENT

Before James B. McMillan, District Judge

Plaintiffs, three inmates of the North Carolina Department of Correction, seek damages and equitable relief from alleged cruel and unusual punishment and from alleged discrimination on the part of the defendants, officers and agents of the North Carolina Department of Correction, of Gaston County, and of Polk County, North Carolina.

Each of the three plaintiffs was convicted of a crime in a Superior Court. Plaintiff Kersh was convicted in Polk County; plaintiffs Price and Rogers were convicted in Gaston County.

In 1971, at the times relevant to this case, each of the plaintiffs was being held in Central Prison or some other unit of the Department of Correction as a "safekeeper." A "safekeeper" is a person who has been convicted of a crime in Superior Court (or in some instances who may be awaiting trial) and who is ordered by a judge to be transferred to the Central Prison or some other unit of the Department of Correction under the appropriate statutes (North Carolina General Statutes §15-183 and §153-189.1) in the interests of the safety of the prisoner or the safety of others.

Although if a conviction is affirmed on appeal the time spent in custody before final affirmance of the conviction does count as part of the sentence to be served, prisoners are not, while in this "safekeeping" status, considered to be "serving a sentence" with the North Carolina Department of Correction. Under G.S. §153-189.1 the state provides

their custody and maintenance but the counties pay for it. The average number of "safekeepers" in state custody at any time is about 140.

The average time served by a convicted felon in the North Carolina prison system is about four and one-half years; the average time served by a convicted misdemeanant is a little over ten months; the average period of time that a person remains in the prison system in a "safekeeping" status is about five months.

While in a "safekeeping" status the plaintiff Kersh was examined on May 5, 1971, and was found to have 20-25 vision but did not have any immediate need for eyeglasses (a re-examination some months later revealed that his vision was 20-20 and he did not need eyeglasses).

While plaintiff Max V. Rogers was considered to be a safekeeper he was found to be in need of corrective eyeglasses and false teeth (he apparently came to prison without either). He requested the Department of Correction and his "home" county of Gaston to supply him with corrective eyeglasses and false teeth and the requests were denied. These appliances would have been provided him if he had been a regular member of the prison polulation. In fact, after he became a member of the regular prison population he was fitted with dentures and eyeglasses in the fall of 1971.

While the plaintiff Jimmy A. Price was considered a safekeeper he was found to have a small umbilical hernia (a chronic loose inguinal ring). The Department of Correction declined to provide surgery to correct the hernia. (Some months later, after he became a member of the regular prison population, he was re-examined and found in the opinion of the then examining doctors not to have a hernia.)

Under the administration of the medical program in the North Carolina Department of Correction, medical services for safekeepers are dispensed differently than for the rest of the prison population.

In order to insure that the counties which send safekeepers to the Department of Correction meet their financial responsibility under North Carolina General Statutes §153-189.1, medical services to safekeepers are screened.

Those types of medical services designated as emergency or routine are administered without questioning the county's credit. However, those medical services designated as "elective" are not dispensed until the Department of Correction obtains notice that the county from which the safekeeper came accepts financial responsibility for these services.

The stipulated evidence shows that at least one of the plaintiffs (Rogers)

requested medical services designated elective both from the Department of Correction and through them from the forwarding county. The services were not supplied. Defendants admit that the medical treatment sought would have been provided had he been confined as a prisoner within the regular prison population. No evidence was offered to show whether, if Rogers had remained in the county facility, these services would or would not have been provided.

Contrary to the suggestions of the Attorney General, courts do have the authority and the duty to require prison authorities to observe the guaranties of the federal constitution in the operation of state prisons. It can well be said of North Carolina as it was said of Arkansas in Holt v. Sarver, 309 F.Supp. 362, 305 (E.D. Ark. 1970), affirmed, 442 F.2d 304 (8th Cir. 1971):

> "If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States."

North Carolina has adopted and those in charge of the Central Prison administration appear to accept the duty to operate prisons within the limitations and under the requirements of the Constitution:

> "A prisoner retains all

> the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law." Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).

It is the duty of the court to decide the case, not upon the theory that jails are off-limits for the constitution but upon the merits of the constitutional questions presented.

If an inmate of a jail or correctional institution is subjected to cruel, inhumane or other unconstitutional treatment, or if he is subjected to unlawful discrimination, the fact he may be a "short-timer" or has not fulfilled some residence requirement may not stay the hand of the court which is called upon to determine his constitutional rights.

The prison medical authorities diagnosed the plaintiffs' condition and reported that treatment was needed; and when they became journeymen prisoners, the treatment was in fact given. The issue is not the precise severity and nature of each medical need labelled "elective," but whether there is any justification for inmates being treated to different standards of medical care because these services are being paid for by different divisions of the state government. The stipulated facts are not developed sufficiently to show that Rogers' eyesight was so bad and lighting conditions of the prison were so poor that to deny him eyeglasses and thus the

opportunity to read and write (which of necessity impringes on his right to communicate with counsel and court [see Worley v. Bounds, 355 F. Supp. 175, (W. D.N.C. 1973)], violates his right to be subject to cruel and unusual punishment.

The practice of administering different standards of medical treatment inherently tends to promote the possibility of violation of the Eighth Amendment rights of individual inmates receiving medical treatment under the lower standard. However, on the record in this case the plaintiffs have not proved their allegations of cruel and unusual punishment. The case presents not a question of the constitutional adequacy of treatment of certain individual inmates, but the constitutionality of the policy and practice which maintains two different standards of treatment for prisoners.

The only justifications for the state's different medical treatment of safekeepers offered in oral argument are:

(1) The safekeeper's short time in the prison system makes it a nuisance to provide the same medical treatment provided to other prisoners.

(2) The safekeeper has to be on call to attend court.

(3) To provide the same medical treatment given all prisoners but safekeepers is an administrative

inconvenience and produces an excessive amount of paperwork.

Point (1) is belied by the facts that safekeepers average over five months in the prison system and that the overwhelming majority remain in the prison system after their safekeeper status ends.

Point (2) has no force because the prison system is on call frequently to deliver prisoners to testify in criminal, habeas corpus, and other civil matters.

Point (3) is undermined by the fact that the average number of safekeepers is only one hundred and forty in a North Carolina Department of Correction prisoner population of several thousand. Any extra work involved is relatively marginal.

The weakness of all the suggested justifications for the discriminatory handling of the medical problems of safekeepers is finally demonstrated by the fact that when the county pays for the medical needs designated "elective" then the safekeeper is given the "elective" treatment just like any other prisoner.

The practice of treating prison inmates to two different standards of medical treatment merely because the bills of safekeepers are paid by the counties, whereas the bills of regular prison inmates are paid by the state, is a denial of equal protection of the laws as required by the Constitution.

The Fourteenth Amendment applies to the states, and a state may not escape its constitutional obligations simply by the manner in which it has created subdivisions or departments in order to provide public services. In fact, the United States Constitution does not even mention counties, cities, towns, county jails or state prisons; the probable existence of these entities is recognized by innuendo only, in the context of guaranties against cruel and unusual punishment, discriminatory treatment, due process of law and in other guaranties of civil rights and liberties.

There is no rational basis in giving prisoners different medical treatment just because the state has divided the responsibility of footing the bills among different governmental subdivisions. That a certain classification saves the state money has often been dismissed as a hindsight excuse insufficient to be a rational basis for an otherwise meaningless classification. Rinaldi v. Yeager, 384 U.S. 305 (1966); Shapiro v. Thompson, 394 U.S. 618, 632-633 (1969). Here the classification is even more tenuous, being based purely on the accident of which state instrumentality pays the bill, and as such it is arbitrary and unreasonable.

The discrimination is also an unnecessary irritant in the correctional process; unequal or otherwise unfair treatment diminishes rather than increases respect for organized society;

the irrationality and unfairness of denying a prisoner certain medical treatment merely because there is some quarrel over which one of the state's pockets should provide the payment for this treatment impairs rehabilitation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the defendants discontinue the practice of treating safekeepers differently in any medical matter from other prisoners generally; that each plaintiff recover One Dollar ($1.00) as nominal damages; that defendants pay the costs of this action; and that since no actual damages to plaintiffs have been shown, no further relief is ordered, and the suit is hereby dismissed.

This 30 day of March, 1973.

/s/ James B. McMillan
James B. McMillan
United States District Judge